No. 09-1252

IN THE

# Supreme Court of the United States

ROY H. LUBIT,

*Petitioner,*

*v.*

ELANA B. LUBIT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the procedure utilized to determine a child custody dispute between parents in a state court divorce action in (i) appointing a forensic child psychiatrist to make an assessment concerning custody and to submit his findings concerning the parties' relative parenting abilities to the court and (ii) determining the children's "best interests" after a trial by a "preponderance of the evidence" comports with the Due Process Clause of the Fourteenth Amendment.

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## INTRODUCTION

Petitioner (the father of three minor children) seeks a writ of certiorari to review the determination of an award of custody to Respondent (the children's mother) that was made in a state court divorce action. In accordance with New York law, the New York Supreme Court: appointed independent counsel for the children; appointed a forensic child psychiatrist to conduct an assessment and to submit findings to the court; conducted a trial; determined the children's "best interests" by a preponderance of the evidence in written decision; and awarded custody of the parties' children to Respondent and specified visitation to Petitioner. [Pet. 16-17, 5a-34a]

Petitioner asserts that the above procedure violated his constitutional right to due process and then presents a variety of reasons in an effort to support this claim. However, notwithstanding the various rationales he presents, Petitioner fails to set forth any basis under existing law for his contentions. In reality, Petitioner is simply a disgruntled litigant, whose claims for custody were repeatedly rejected in the state courts based on factual findings with which he disagrees.

Thus, Petitioner does no more than advance contrived claims of constitutional error, which demonstrate his unrelenting "inflexib[ility] in . . . response to the children's needs"[1] and his persistence in continuing to challenge a settled custody

[1] A finding made with respect to Petitioner by the forensic child psychiatrist. [Pet. 3a]

determination in this Court, the litigation for which started almost six years ago. To be sure, Petitioner raises no issues that require this Court's review, and the petition for a writ of certiorari should be denied.

## REASONS FOR DENYING THE PETITION

### A. *Alleged Constitutional Violations*

The procedures employed below in determining the parties' disputed claims for custody comported with long-standing New York law and were fair in every respect. The trial court properly accorded the children party status, and they were represented by court-assigned independent counsel. 22 NYCRR § 7.2. The trial court properly appointed a forensic child psychiatrist to conduct an assessment and to submit findings with regard to the parties' relative parenting capacities. *Kesseler v. Kesseler*, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962). A trial was conducted at which all parties (including Petitioner and the children) were accorded an opportunity to offer evidence, to cross-examine witnesses, and otherwise to be heard. *See Lincoln v. Lincoln*, 24 N.Y.2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659 (1969). Following the trial, the court properly received post-trial written memoranda from the parties and then issued a written decision. N.Y. CPLR §§ 4016, 4213. The court's determination was based on the children's "best interests." N.Y. Domestic Relations Law § 249(1)(a). As is the case in civil actions in general, the court's findings and conclusions concerning the children's "best interests" were based on a "preponderance of the evidence." *See, e.g., Karcher v. Byrnes*, 232 A.D.2d 760,

761, 649 N.Y.S.2d 484, 485 (3rd Dept.1996). Finally, Petitioner obtained review of the trial court's determination on direct appeal in the New York Supreme Court, Appellate Division, First Department. N.Y. CPLR § 5701(a).

As summarized by the commentators:

> Procedural due process is a guarantee of [a] fair procedure. While due process of law, in its procedural aspect, has never been a term of fixed and invariable content, the essential elements of procedural due process of law are notice and the opportunity to be heard prior to depriving a person of his or her protected property [or liberty] interest. Thus, procedural due process [requires] . . . notice of the proceedings[,] . . . an opportunity to [be heard], that is, a hearing, before an impartial tribunal having jurisdiction of the cause[,] . . .and the . . . deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness. The determination of the appropriate form of procedural protection required under the Due Process Clause requires an evaluation of all the circumstances and an accommodation of competing interests, in which an individual's right to fairness must be respected, as must a court's need to act quickly and decisively.
>
> The Due Process Clause calls for two separate inquiries in evaluating an alleged procedural due process violation: has [a party] lost

> something that fits into one of the three protected categories of life, liberty, or property; and, if so, has the [party] received the minimum measure of procedural protection warranted under the circumstances. . . .
>
> The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one will be personally bound until he or she has had a day in court. . . .
>
> Though the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations. Thus, procedural due process protection does not prescribe or require a failsafe process that totally precludes any possibility of error.

16B Am. Jur. 2d Constitutional Law § 955.

The procedures employed in deciding custody of the parties' children were entirely consistent with the above standards. Petitioner's assertions to the contrary are without merit. Specifically:

1. Petitioner contends that the trial court was somehow "biased" against him. These claims were rejected below. Petitioner does not – and never did – state any "objective" basis for this claim. As such,

Petitioner does not state a due process violation based on the alleged "bias" of the trial court, as a matter of law. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2265 (2009).

2. Petitioner asserts that the appointment of a forensic child psychiatrist to conduct an assessment and to testify at the trial somehow violated his right to due process. The testimony of the child psychiatrist was "primarily based upon on direct knowledge derived from [his] psychiatric interviews of the parties and their children, alone and in combination." [Pet. 3a] However, Petitioner complains that the child psychiatrist was permitted to rely, in part, on hearsay data, even though it is of a type reasonably relied upon by experts in the field in forming opinions or inferences. [Pet. 16a] As detailed below, Petitioner's claim that this procedure was somehow unconstitutional is devoid of merit.

It is well-established under both state and federal law that, in a civil action, a properly qualified expert may provide opinion testimony based, in part, on hearsay data "reasonably relied upon by experts in the particular field." *E.g.*, Fed. R. Evid. 703; *Hambsch v. N.Y. City Transit Auth.*, 63 N.Y.2d 723, 726, 480 N.Y.S.2d 195, 197, 469 N.E.2d 516, 518 (1984). Notably, such hearsay data is admissible for a limited purpose, i.e., not for the truth of the matter asserted, but rather only to establish a part of the basis for the expert's opinion. *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 717 (6th Cir. 1999); *People v. Campbell*, 197 A.D.2d 930, 932, 602 N.Y.S.2d 282, 284 (4th Dept. 1993). In any event, "the due process clause does not place a per se prohibition on the use of hearsay evidence." *Costa v. Fall River Hous. Auth.*, 453

Mass. 614, 625, 903 N.E.2d 1098, 1109 (2009). In another context, this Court has discussed the intersection of hearsay and procedural due process:

> Hearsay rules . . . similarly prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable. Of course, to say that the right to introduce relevant evidence is not absolute is not to say that the Due Process Clause places no limits upon restriction of that right. But it is to say that the defendant asserting such a limit must sustain the usual heavy burden that a due process claim entails. . . .

*Montana v. Egelhoff*, 518 U.S. 37, 42-43 (1996) (plurality opinion) (citation and footnote omitted).

Here, the trial court ruled the testimony of the forensic child psychiatrist admissible. [Pet. 19a-20a] The admissibility of the child psychiatrist's testimony was expressly upheld on appeal. [Pet. 3a] There was nothing about the trial court's appointment of this expert and admission of his testimony at the trial that violated Petitioner's due process rights.

3. Petitioner also contends that the state courts violated his right to due process by employing a "best interests of the child" standard in determining to award custody to Respondent. Petitioner alleges that this standard is unconstitutionally vague. [Pet. 3] This contention should be rejected out of hand.

Contrary to Sup. Ct. Rule 14(1)(g)(i), Petitioner does not set forth in his petition "where in the court of first instance[ ] and in the appellate courts . . . [this] federal question[ ] [was] . . . raised[,]" and, in fact, the issue is not preserved. Regardless, this Court emphasized in *Reno v. Flores*, 507 U.S. 292, 303-04 (1993), that "'[t]he best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody." There is nothing unconstitutional about this standard in the context of the present case under existing and well-established law. *See id.*

Notably, Petitioner does not reference *Reno* or even attempt to explain why this relatively recent Supreme Court precedent should now be jettisoned as a matter of constitutional law. *See Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 875, 912-13 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.").

4. Finally, Petitioner maintains that his right to due process was violated because the state courts utilized a "preponderance of the evidence" standard in deciding the children's best interests. According to Petitioner, the state courts should have applied the higher "clear and convincing evidence" standard that is constitutionally mandated in proceedings brought by a state to terminate parental rights and free a child for adoption. *See Santosky v. Kramer*, 454 U.S. 745 (1982).

Here again, Petitioner does not state where this issue was raised below. This is because it was not raised below. Nevertheless, the application of the "preponderance of the evidence" standard in a simple custody dispute between parents is plainly constitutional.

> Thus, while the parties may be intensely interested in a civil dispute [such as one concerning custody], application of a fair preponderance of the evidence standard indicates both society's [lesser] concern with the outcome [in a civil dispute between two private parties who stand on an equal footing], and a conclusion that the litigants [in such a dispute] should share the risk of error in roughly equal fashion.

*Santosky v. Kramer*, 454 U.S. at 755 (citations and internal quotations marks omitted).

It is only because of the more substantial constitutional interests at issue and the potential level of state interference with those interests in a proceeding to terminate parental rights concerning a dependent, neglected or abused child that the state is compelled to prove its allegations against a parent by "clear and convincing evidence." *Id.*; *see also Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976) (per curiam); *cf. In re Winship*, 397 U.S. 358 (1970) (applying the "beyond a reasonable doubt" standard in juvenile delinquency proceedings because personal freedom is at stake).

Given the private nature of the present dispute between two parents, there was nothing constitutionally unsound in deciding custody of the parties' children by a "preponderance of the evidence."

B. ***Jurisdiction***

As stated, the state trial court accorded the children party status and assigned them independent counsel. In fact, the attorney for the children participated in all aspects of the trial and appellate proceedings below.

A petition for a writ of certiorari must be timely served "on each . . . party separately represented in the proceeding." Sup. Ct. Rule 29. Notwithstanding this mandate, Petitioner did not serve the children's attorney with the present petition, and the time to do so has now expired. Sup. Ct. Rule 13. Accordingly, this Court is precluded from making any determination whatsoever involving the children and their custody. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89 (1946) (stressing that when specified parties in proceedings below "have not been named as respondents here or served [as mandated by applicable rules]," the Supreme Court is "precluded from making any determination concerning their rights or liabilities").

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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